

SPECIAL CIVIL APPLICATION No 8743 of 1999

Hon'ble MR.JUSTICE H.K.RATHOD

CAV JUDGEMENT

Learned Advocate Mr. Bharat G. Jani appearing on behalf of the petitioner and Learned Advocate Mr. I. M. Pandya appearing on behalf of the respondent on caveat. In the present petition award passed by the Labour Court, Kalol in Reference No. 133 of 1989 dated 14th May, 1999 has been challenged by the petitioner. In the said award the Labour Court has set aside the order of termination and granted reinstatement with continuity of service with 50% back wages of interim period.

The brief facts of the present petition are that the respondent workman was appointed as a Clerk in the year 1984 by the petitioner. Thereafter, the respondent workman was appointed on 2nd November, 1985 as a daily rated ad-hoc Clerk by the petitioner. Thereafter, the respondent workman was appointed by order dated 29th August, 1986 with effect from 1st August, 1986 in the post of Clerk on probation for the period of one year with a condition that if during the probationary period the work of respondent is not found satisfactory then his service shall be terminated as per rules of the petitioner. Thereafter, by order dated 9th May, 1988 considering, the unsatisfactory work of respondent workman, the probationary period was extended after period of one year from 1st August, 1987. In the said order dated 9th May, 1988 extension of probationer period, the fact of negligence, unsatisfactory work and charge sheet was referred by the petitioner. The said one year period was over on 31st July, 1988. Thereafter, the probationary period was not extended but, the respondent was remained in service after completion of probationer period from 31st July, 1988. The effect of none extension of probationary period, the respondent workman was continued in service without any order of confirmation from 1st August, 1988 till the date of termination i.e. 7th September, 1988. The service of the respondent workman was terminated by the petitioner on 7th September, 1988. In the termination order allegation of misconduct, stigma and incident of unsatisfactory work has been referred by the petitioner. It is made very clear in the termination order that service of respondent has terminated because of misconduct as mentioned in the order, unsatisfactory work and negligence. Thereafter, the respondent has challenged the termination order dated 7th September, 1988 before the Labour Court, Kalol being reference No. 133 of 1989. Before the Labour Court, the respondent has filed statement of claim on 27th March, 1990 and the respondent has filed written statement on 22nd September, 1992 vide Exh. 5 and 12 respectively. Thereafter, the petitioner has produced 40 documents vide Exh. 14 which

are exhibited from 16 to 54 then respondent has produced letter of District Registrar of cooperative Society vide Exh.71 then respondent was examined vide Exh. 55 and the witness of petitioner Shri Virsangbhai Chelabhai was examined and thereafter, another witness Shri Rohitkumar Jentilal of the petitioner was examined vide Exh.68. Thereafter, the Labour Court has heard the matter on merits and considered the evidence on record and came to the conclusion that service of the respondent was terminated by the petitioner on the basis of allegation, stigma, misconduct and unsatisfactory work. But, before terminating the service of the respondent undisputedly no departmental inquiry was initiated against the respondent and the respondent has completed about four years service continuous and completed 240 days continuous service. Even though Section 25-F has not been followed by the petitioner and therefore, the evidence on record and also keeping in mind the delay from 1989 to 1993 when first time the respondent was examined before the Labour Court, therefore, considering the evidence of the respondent the Labour Court has granted 50% back wages of interim period with a direction of reinstatement with continuity of service by award dated 14th May, 1999. This award is under challenged by the petitioner.

Mr. Jani appearing on behalf of the petitioner has read the relevant documents on record before this Court. Mr. Jani submitted that during the probationary period if work of the respondent is not found satisfactory then it is a right of petitioner to terminate the service of such probationer. Mr. Jani also submitted that respondent was not working in satisfactory manner and various memos were given to him to improve his conduct but ultimately, his conduct was not improved then by resort the service of the respondent was terminated. Mr. Jani also submitted that it was not malafide action or colourable exercise of power by the petitioner as unsatisfactory work has been admitted by the respondent in reply to various memos. He pointed out that in all twenty memos were given to the respondent. He also read the evidence of Shri Virsangbhai, Rohitbhai and respondent. He also submitted that there was no victimisation by the petitioner in terminating the service of the respondent. He relied upon some of the decision of the Apex Court reported in the case of Oil and Natural Gas Commission and others v. Dr. Md.S.Iskander Ali reported in A.I.R. 1980 S.C. page 1242 wherein, it has been observed that termination simpliciter of probationer appointed in temporary post after dropping inquiry against him and work of probationer never satisfactory the termination did not

attract Article 311. He also relied upon the decision of *Triveni Shankar Saxena v. State of U.P. and others* reported in A.I.R. 1992 S.C. page 496 wherein, it has been observed that termination of service person employed temporarily as Lekhpal selected de novo as Consolidator in Consolidation Department holding post of temporary Assistant Consolidator Officer adverse entries about unsatisfactory performance against him passing of order of termination (simpliciter) without casting stigma or disclosing penal consequences against him not illegal. He also relied upon another decision of the Apex Court in the case of *Governing Council of Kidwai Memorial Institute of Oncology, Bangalore v. Dr. Pandurang Godwalkar* and another reported in A.I.R. 1993 S.C. page 392 wherein, it is observed that termination simpliciter termination of service of probationer after preliminary inquiry taking into consideration overall performance and some actions or inaction does not amount to removal from service as punishment. Number of tearing of veil to find out real nature of order of termination. Applicable, where direct nexus exists between charges levelled and action taken. He also relied upon other decision in case of *State of U.P. and another v. Km. Prem Lata Mishra and others* reported in A.I.R. 1994 S.C. page 2411 wherein, it is observed that temporary servant termination of service on grounds, of unsatisfactory work, unsuitability, and unfitness and not by way of punishment valid not necessary to conduct departmental inquiry under the service rules.

Mr. Jani also raised contention about periodical appointment on probation and termination by afflux of time is does not amount to retrenchment as per Section 2(oo)(bb) of Industrial Disputes Act, 1947.

The Learned Advocate Mr. I.M.Pandya appearing on behalf of the respondent has submitted that considering the evidence of Virsangbhai Chelabhai President of petitioner in terms admitted that the service of the respondent was terminated due to misconduct and on the basis of charge sheet vide Ex. 36 and before terminating the service of the respondent no departmental inquiry was initiated and Section 25-F has not been followed. After the termination of the respondent one Clerk was appointed in place of the respondent and said fact is also admitted by Rohitbhai witness of petitioner that after the termination of respondent the nephew of President was appointed by the petitioner. Therefore, Mr. Pandya submitted that in view of undisputed fact between the parties the order of termination is rightly set aside by the Labour Court. He relied upon one decision of

Division Bench of this Court in case of Gujarat Bank Workers Union v. Jamnagar District Cooperative Bank Limited reported in 1979(1) L.L.J. page 82 wherein, it is observed that the employer would lose his right to terminate unless he exercises the option before the maximum probationary period expired because thereafter the employee was automatically considered as a confirmed. There would be no question of terminating his services as probationer when he was automatically confirmed. The whole basis of the order and the operative part of the order casts a stigma upon the employee as incompetent and his conduct is unsatisfactory. There being a stigma in the order itself and there is another intrinsic evidence that the order is a penal order. So far as the industrial jurisprudence is concerned, the Labour Court and Tribunal were bound, in view of the settled legal position to x-ray the order of termination as a bounden duty and discover its true nature, if the object and effect, if the attendant circumstances and ulterior purpose had been really to dismiss the employee.

I have considered the submissions of both the learned advocates. The undisputed facts from the records are that respondent workman was appointed from 1984 in the post of Clerk by the petitioner society. Thereafter, the respondent workman was continued in service and appointed on probation with effect from 1st August, 1986 by order dated 29th August, 1986 for the period of one year. Thereafter, his probation period was extended by a further period of one year with effect from 1st August, 1987. In the extension order allegation of negligence to remain absent without prior permission, fact of charge sheet etc. are alleged against the respondent workman. The said period of one year was over on 31st July, 1988. Even though his service was not terminated on 31st July, 1988 but, the respondent was continued in service up to 7th September, 1988. On 7th September, 1988 the termination order was passed by the petitioner which is not a simple termination but, in termination order the foundation of termination was specifically mentioned by the petitioner society and in all five misconducts were alleged against the respondent workman. For that, undisputedly, no departmental inquiry was initiated by the petitioner society. From 1st August, 1988 to 7th September, 1988 the probation period was not extended and he was not made confirmed by the society. Prior to termination the charge sheet was served which was produced before the Labour Court vide Exh. 36 and witness of petitioner Shri Virsangbhai Chaudhary had admitted the fact that service of respondent was terminated on the basis of charge sheet and because of

misconduct committed by the respondent. After his termination two new Clerks were recruited and one was posted against the post of the respondent. Rohitbhai, the witness of petitioner society, admitted that no departmental inquiry was initiated against the respondent before terminating the service of respondent. After the termination of respondent the nephew of President of petitioner society was appointed and at the time of termination retrenchment compensation were not paid to the respondent.

In view of undisputed facts from record that this is not a simple termination but, on the contrary termination order based on having clear foundation of misconduct and charge sheet. It is a clear case of victimisation because service of respondent was terminated with a view to recruit the nephew of President which was the case of respondent from the very beginning and same was mentioned in statement of claim and oral evidence of respondent. Therefore, the decision of the Apex Court which has been cited by the advocate of petitioner is not applicable to the facts of present case.

The law in respect to termination of service of the probationer is recently decided by the Apex Court in case of Dipti Prakash Benerji v. Satyendra Nath Bose National Center For Basic Sciences, Culcutta and others reported in 1999 S.C. Cases Labour and Service page 596 wherein, the Apex Court has observed that it is true that the Supreme Court in some of the cases has held that termination order is not punitive where employee has been given suitable warning or has been advised to improve himself or where he has been given a long rope by way of extension of probation. However, in all such cases there were simple orders of termination which did not contain any words amounting to stigma. On the other hand there is a stigma in the impugned order which cannot be ignored because, it will have effect on the appellant's future. Stigma need not be contained in termination order but, may also be contained in an order or proceeding referred to in termination order or in an Annexure thereto and would vitiate the termination order. In the said decision of the Apex Court earlier at least thirty decisions from A.I.R. 1958 S.C. page 36, in case of Parshattamlal Dhingra v. Union to in case of Radheshyam Gupta v. Uttar Pradesh State Agro Industry Corporation reported in 1999(2) S.C.Cases page 21 has been considered by the Apex Court in detail. The said decision has squarely covered the facts of present case wherein, the petitioner society has specifically made allegations of

misconduct and stigma in order of termination itself and considering order of extension of probation period dated 9th May, 1988 and oral evidence led in the present reference. It is clear that a misconduct and stigma has been foundation of terminating the service of respondent without holding any departmental inquiry against the respondent. After the case of Dipti Prakash Benerji the Apex Court in case of V.P.Ahuja v. State of Punjab and others reported in 2000 A.I.R. Supreme Court Weekly page 792 where the Dipti Prakash Benerji was considered by the Apex Court wherein, the Apex Court has observed that a probation, or temporary servant, is also entitled to certain protection and his services cannot be terminated arbitrarily, nor can those service be terminated in a punitive manner without complying with the principle of natural justice. The termination order founded on the ground that the probationer had failed in the performance of his duties administratively and technically. Ex facie, is stigmatic. Such an order which on the face of it, is stigmatic could not have been passed without holding a regular inquiry and giving an opportunity of hearing to the probationer. Plea that, probationer cannot claim any right on post as his services could be terminated at any time during the period of probation without any notice, as set out in the appointment letter, cannot be contended. Thereafter, the Apex Court has considered another similar situation in case of Narsing Pal v. Union of India and others which is reported in 2000 A.I.R. S.C.Weekly page 1141 wherein, the Apex Court has observed in relying upon the decision of Gujarat Steel Tubes Limited v. Gujarat Steel Tubes Mazdoor Sabha, reported in A.I.R. 1980 S.C. page 1896. The relevant observation of paragraph-53 is as under :

" Masters and servants cannot be permitted to play hide and seek with the law of dismissals and the plain and proper criteria are not be misdirected by terminological cover-ups or by appeal to psychic processes but must be grounded on the substantive reason for the order, whether disclosed or undisclosed. The Court will find out from other proceedings or documents connected with the formal order of termination what the true ground for the termination is. If, thus scrutinised, the order has a punitive flavor in cause or consequences, it is a dismissal. If it falls short of this test, it cannot be called a punishment. To put it slightly differently, a termination effected because the matter is satisfied of the misconduct and of the consequent

desirability of terminating the service of the delinquent servant, is a dismissal, even if he had the right in law to terminate with an innocent order under the standing order or otherwise. Whether, in such a case the grounds are recorded in a different proceeding from the formal order does not detract from its nature. Nor the fact that, after being satisfied of the guilt, the master abandons the inquiry and to proceeds to terminate. Given an alleged misconduct and alive nexus between it and the termination of service the conclusion a dismissal. Even if full benefit as on simple termination are given and none injurious terminology is used.

Applying the above principles, the order in the instant, case, cannot be treated to be a simple order of retrenchment. It was an order passed by way of the punishment and, therefore, was an order of dismissal which having been passed without holding a regular departmental inquiry, be sustained."

Considering the observation made by the Apex Court in above referred cases and the conclusion of the Labour Court that the order of termination was tainted with stigma and misconduct and no departmental inquiry was held prior to termination. Provisions of Section 25-F are also not followed while passing the termination order. Therefore, the Labour Court has rightly come to the conclusion that termination order is illegal, unreasonable and arbitrary. The gainful employment of the respondent workman was not proved by the petitioners. However, considering the facts of Ref. is 1989 and deposition of respondent workman dated 23rd June, 1993 the Labour Court has granted only 50% back wages which according to my opinion, is legal, proper and reasonable. I have perused the entire record. I have considered the reasoning given by the Labour Court. I have also referred the oral evidence of respondent workman, Virsangbhai Chaudhary and Rohitbhai. According to my opinion, the Labour Court has not committed any error either in law or facts. The finding of the Labour Court is based upon legal evidence and same is not perverse. The Labour Court has not committed any jurisdictional error and this Court cannot act as a Appellate Court and also cannot reappreciate the same evidence which was led before the Labour Court. Mr. Jani has cited some of the

decision of the Apex Court which all were considered by the Apex Court in case of Dipti Prakash Benerji and therefore, none of the decision is helpful to the submission of Mr. Jani. Mr. Jani has not pointed out any jurisdictional error committed by the Labour Court and also not pointed out any infirmity in this award which required any interference from this Court while exercising the powers under Article 226 and 227 of the Constitution of India. Therefore, present petition is dismissed summarily. No order as to costs. However, in the facts and circumstances of this case, it is directed to the petitioner society to implement the award passed by the Labour Court, Kalol in Reference No. 133 of 1989 dated 14th May, 1999 within a period of six weeks from the date of receiving the certified copy of this order.

Date: 22-06-2000. (H.K.RATHOD, J.)

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